

N.D.A.G. Letter to White Eagle (Oct. 16, 1986)

October 16, 1986

Ms. Maureen White Eagle
Devils Lake City Attorney
P. O. Box 1048
Devils Lake, North Dakota 58301

Dear Ms. White Eagle:

Thank you for your letter of October 3, 1986, concerning the city administrator form of government within the city of Devils Lake. In your letter, you essentially question whether Devils Lake has managed to adopt a city manager form of government without following the requirements of N.D.C.C. Ch. 40-10. If Devils Lake's city administrator form of government is essentially a city manager form of government and has not been adopted in compliance with state law, you question whether it is advisable for the city of Devils Lake to repeal the ordinance relating to the city administrator.

The crucial question to this matter is whether the city of Devils Lake, as a home rule city, possesses the authority to determine its own form of government without compliance with state law. As you know, powers of a home rule city are listed in N.D.C.C. § 40-05.1-06. In subsection 4 of this statute, home rule cities are authorized to provide for city officers, agencies, and employees, their selection, terms, powers, duties, qualifications, and compensation.

However, in 1980, the North Dakota Supreme Court interpreted this particular subsection and held that the Legislature did not intend to give home rule cities the authority to select any form of government they may desire. Instead, the court concluded that, in the matter of changing the form of government, the Legislature intended home rule cities to be governed by those laws applying to cities generally. Litten v. City of Fargo, 294 N.W.2d 628 (N.D. 1980).

In response to this supreme court decision, the 1985 Legislative Assembly added the following sentence to N.D.C.C. § 40-05.1-06(4):

To provide for change, selection, or creation of its form and structure of government including its governing body, executive officer, and city officers.

1985 N.D. Sess. Laws 455. Clearly, the Legislature has expressly provided home rule cities the authority to provide for their own form of government without reliance upon or compliance with those state laws governing cities generally.

However, the fact that N.D.C.C. § 40-05.1-06(4) has been specifically amended by the Legislature to authorize home rule cities to provide for their own form of government does

not necessarily mean that such authority automatically exists. N.D.C.C. § 40-05.1-06 authorizes home rule cities to perform the specified powers so long as they are "included in the charter and implemented through ordinances." A review of the documents enclosed with your letter as to the Devils Lake home rule charter indicates that the charter has not been amended so as to include the 1985 legislative amendment to N.D.C.C. §40-05.1-06(4). In other words, the Devils Lake home rule charter apparently does not authorize the city to provide for the change, selection, or creation of its form and structure of government including its governing body, executive officer, and city officers.

Thus, despite the fact that state law authorizes home rule cities to provide for their own form of government, this authority is not effective so long as it is not included within a home rule charter and implemented through a home rule ordinance. In the case of the city of Devils Lake, based upon the documentation provided to this office, the home rule charter does not include the authority to provide for its own form of government. Thus, the city of Devils Lake, in attempting to change its form of government, would be governed by those laws applying to cities generally. Litten v. city of Fargo.

In reviewing the laws governing cities generally as to their form of government, by which the city of Devils Lake would now operate in absence of an amendment to its home rule charter expanding the authority of the city to change its form of government, it is noted that the city manager form of governments must be submitted and approved by the city electors. N.D.C.C. § 40-10-01. Apparently, such a vote has not occurred in Devils Lake with respect to its city administrator form of government. Further, one notes in reviewing the supplied documentation that the description of the city administrator is nearly identical to that of a city manager. In fact, in several places within the city of Devils Lake ordinances, the word "manager" appears as opposed to the word "administrator." These facts suggest that Devils Lake has improperly adopted the city manager form of government without compliance with N.D.C.C. Ch. 40-10. However, I am reluctant to conclude this as a matter of law, as this is essentially a question of fact which can only be answered by the appropriate city officials in Devils Lake. However, where the facts indicate the city is acting under a form of government not provided to cities generally, the conclusion may be drawn that the city has acted improperly in attempting to change its form of government.

If this is the conclusion reached in the case of the city of Devils Lake, there are two options available. First, the city home rule charter may be amended to include the 1985 legislative amendment to N.D.C.C. §40-05.1-06(4). This would provide the needed authority to the city to determine its own form of government without reliance upon or compliance with the state laws generally applicable to cities. Second, the city of Devils Lake may formally adopt the city manager plan using those procedures set forth in N.D.C.C. Ch. 40-10.

Sincerely,

Nicholas J. Spaeth

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